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U.S. CONGRESS. HOUSE. INTERSTATE AND FOREIGN COMMERCE.

CONTROL OF COMMON CARRIERS BY RAILROADS.

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72D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 1387

CONTROL OF COMMON CARRIERS BY RAILROADS

MAY 19, 1932.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. RAYBURN, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

[To accompany H. R. 11643]

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The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 11643) to amend section 5 of the interstate commerce act, as amended, relating to the consolidation and acquisition of control of carriers by railroad, and for other purposes, having considered the same, report thereon with a recommendation that it pass.

The bill has the approval of the Interstate Commerce Commission.

In this report section 5 of the interstate commerce act, and the proposed changes therein, are explained, and the reasons for the recommended changes are given.

SECTION 5 OF THE INTERSTATE COMMERCE ACT

EXPLANATION OF PRESENT PROVISIONS

Paragraphs (2) to (8), inclusive, of section 5 of the interstate commerce act relate to the subject of railroad consolidations. These provisions direct the Interstate Commerce Commission to prepare and adopt a plan for the consolidation of the railway properties of the continental United States. Conditions are specified, in paragraph (6), under which carriers by railroad may consolidate. One of the requirements is that any consolidation must be found by the Interstate Commerce Commission to be in harmony with and in furtherance of the consolidation plan. Authority is also given, in paragraph (2), for one carrier to acquire control (in any manner not involving consolidation) of another carrier or carriers, with the approval of the commission. This latter provision does not require, as a condition of approval, that the acquisition shall be in harmony with the consolidation plan, but provides for approval if the proposal will be in

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the public interest. It is further provided, in paragraph (8), that a carrier which is a party to an authorized acquisition of control, and any corporation organized to effect an authorized consolidation, is to be relieved from the operation of antitrust laws and other laws, Federal or State, so far as necessary to effectuate the acquisition of control or consolidation.

EXPLANATION OF PROPOSED CHANGES IN SECTION 5

The bill (secs. 1 and 2) proposes a substitute for the paragraphs (2) to (8) of section 5, above referred to.

Since a plan for the consolidation of railway properties has now been adopted by the Interstate Commerce Commission, as directed by law, no reason is apparent for hereafter permitting the acquisition by one carrier of control of another carrier or carriers without regard to such plan, as is the case under the present paragraph (2), and therefore it is proposed to combine such paragraph (2) with the present paragraph (6), which relates to consolidations and requires conformity with the consolidation plan. These two paragraphs are, in substance, incorporated in the proposed new paragraph (4). The provisions of the present paragraph (3) appear in the bill in paragraph (14). By reason of these changes, the present paragraphs (4) and (5) are renumbered as (2) and (3), respectively, and the last sentence of the present paragraph (5) is stricken out because of the other changes proposed by the bill. The present paragraph (7) is omitted entirely since it was temporary legislation and has served its purpose. The provisions of the present paragraph (8) appear in the proposed paragraph (15).

The following is a brief explanation of such proposed new provisions. Reference may be made in this connection to the explanation by W. M. W. Splawn, appearing at pages 5 to 43 in the report of the hearings on the bill H. R. 9059, which formed the basis for sections 1 to 4 of the present bill. Special attention is directed to pages 21 to 43. In reading such explanation it is necessary to bear in mind that the paragraphing of the bill has been changed in its reintroduced form. However, the changes in the text of the bill are not substantial, so that the explanation, on the whole, remains accurate.

Paragraph (4): This paragraph, while it includes substantially the provisions of the present paragraphs (2) and (6), is more comprehensive in its scope and authorizes consolidations, mergers, purchases, leases, operating contracts, and acquisitions of control, if approved by the commission as being in harmony with the consolidation plan and as promoting the public interest. It will be noted that it goes beyond the present law in that it specifically authorizes a corporation which is not a carrier to acquire control of two or more carriers, and a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier, the control in both cases to be effectuated by ownership of stock.

Paragraph (5): This paragraph supplements paragraph (4) by providing that whenever a corporation which is not a carrier acquires control of any carrier or of two or more carriers as provided in paragraph (4), such corporation shall be subject, to such extent as may be provided by the commission, to the provisions of the interstate commerce act relating to reports and accounts and the issuance of securities.

Paragraph (6): A means having been furnished under paragraph (4) by which consolidations, mergers, purchases, leases, operating contracts, and acquisitions of control may be effected, it is intended by this paragraph to prevent consolidations, unifications, common controls, and common managements being effected, in the future, otherwise than as authorized in such paragraph (4), it being the intention that the Interstate Commerce Commission shall have an opportunity to pass upon such matters in order that transactions resulting in combinations and controls of carriers may be accomplished in an orderly manner, with due regard to the consolidation plan and the public interest. It is clear from past experience in the administration of the present provisions of section 5 of the interstate commerce act that through the use of ingenious legal devices and combinations of interests it is possible to effectuate controls and virtual unifications of carriers the existence of which it is difficult, if not impossible, to prove as a matter of law. It is, therefore, very difficult to write a provision which will be effective in bringing such activities under public control. This paragraph, together with the proposed paragraphs (4), (7), (8), and (9), attempts to accomplish this result, and this to some extent accounts for the fact that these provisions are somewhat involved. It will be noted that paragraph (6) contains a provision that it shall be unlawful to maintain control or management accomplished or effectuated in violation of its provisions. Since the bill does not provide for a criminal penalty for violations of paragraph (6), but merely provides for the commission securing equitable relief to compel obedience to the provisions of paragraph (6) and of orders of the commission enforcing such paragraph, it was deemed necessary to include this provision in order that an equity court would have a subject with respect to which it could act. This particular provision, as well as the whole of paragraph (6), only operates as to the future.

Paragraphs (7), (8), and (9): As stated above, these paragraphs supplement paragraph (6) and are necessary because of the difficulty in establishing as a matter of law, in many cases where as a matter of fact it is known, that control or management in a common interest of two or more carriers is effectuated or actually exists. The provisions of paragraph (6) would be of little effect unless the language contained therein were construed to include control or management effectuated or exercised indirectly through the use of legal devices such as holding companies, voting trusts, and combinations of affiliated interests. It is, therefore, intended by the provisions of paragraphs (7), (8), and (9) to make sure that paragraph (6) covers such types of control and management. The transactions sought to be reached are illustrated by a chart appearing on page 34 of the hearings on the bill H. R. 9059. The paragraphing of the present bill is different from that of H. R. 9059, and it is necessary to explain that in that chart the illustrations given of the application of the proposed paragraph (5) (b) (A), (B), and (C), in the bill H. R. 9059, are applicable in the present bill to paragraph (7) (a), (b), and (c). This is likewise true of the explanations of the chart appearing on pages 32 to 35, inclusive, of such hearings. In order to indicate the purposes of paragraphs (7), (8), and (9) in their relation to paragraph (6), it may be well to give here a typical illustration. If holding company X (being affiliated, within the meaning of paragraph (8), with railroad A) holds part of the stock of railroad B and railroad A

purchases enough of the stock of railroad B so that the holdings of X and A, when added together, give a working control of railroad B, then the purchase by railroad A would by virtue of the provisions of subparagraph (a) of the proposed paragraph (7) be a transaction deemed to accomplish or effectuate control or management in a common interest of two carriers, for the purposes of paragraph (6), even though the amount of stock purchased by railroad A may have been small. The effect would be the same in a case in which, instead of only A and X being involved, stock also were held by other persons affiliated with A. The determining factor is whether, after A's transaction, the interests of A and all persons affiliated with A, when added together, give control of railroad B. If such is the case, and railroad A did not get the approval of the commission, paragraph (6) will have been violated. Many more illustrations could be given. A study of the explanation and diagrams contained in the hearings will show the types of transactions (whether by carriers or by affiliated persons, or by both) which it is intended to cover.

Paragraph (8) contains a definition of an affiliated person for the purposes of paragraph (7).

Paragraph (9) provides that where reference is made in paragraphs (6), (7), and (8) to control it is immaterial whether such control is direct or indirect.

Paragraph (10): By this paragraph the commission is authorized to investigate and determine whether any person is violating the provisions of paragraph (6), or, in other words, whether any person is maintaining control or management accomplished or effectuated in violation of such paragraph. If the commission finds such violation, it is authorized by order to require the violator to take such action as may be necessary to prevent continuance of such violation.

Paragraph (11): By this paragraph it is intended to prevent the holding of stock of railroads under certain circumstances calculated to prevent the furtherance of the plan for the consolidation of railroads. This provision has been referred to as being retroactive because it is possible that it may apply to stock which has been acquired before the enactment of the bill; but this is inaccurate. The provision is entirely prospective in its application. It authorizes the commission to determine whether the holding by any person of stock or other share capital of any carrier (unless acquired with the approval of the commission) has the effect of subjecting the carrier to the control of another carrier or to common control with another carrier, and also has the effect of preventing or hindering the carrying out of any part of the consolidation plan or of impairing the independence of the systems provided for in such plan. If the commission finds that the holding (and this, of course, includes the manner in which the voting power is being exercised) has these effects, it is to provide by order for restricting the exercise of voting power with respect to such stock or other share capital to the extent necessary to prevent such holding from continuing to have such effects.

Paragraph (12): This paragraph is included to make sure that authority may be had for suspending any proceeding the decision in which is dependent upon the then existing consolidation plan, if the plan has been reopened in some respect which may affect the decision under the proceeding in question.

Paragraph (13): Since the bill makes no provision for criminal penalties in case of violation of the before-mentioned provisions, this paragraph furnishes a means for the enforcement of such provisions and of orders of the commission in cases where the commission finds that the provisions are being violated or that its orders are being disobeyed. It authorizes the district courts of the United States to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain violations or to compel obedience to orders.

Paragraph (14): This paragraph authorizes the making of supplemental orders and includes the provisions of the present paragraph (3).

Paragraph (15): This paragraph corresponds to the present paragraph (8) and provides for relief from the antitrust laws and other Federal and State laws in so far as necessary to permit carriers and corporations to do anything authorized or required by orders issued under the preceding paragraphs.

Paragraph (16): This is a provision providing for separability of the provisions of the preceding paragraphs in case any part thereof may be held invalid.

Paragraph (17): This is a definition of the term "person" for the purposes of paragraphs (4) to (16), inclusive.

Section 3 of the bill merely provides for necessary renumbering of the remaining paragraphs of section 5 which are not changed by the bill.

Section 4 is intended to preserve the existing provisions of the interstate commerce act with respect to the acquisition by any carrier, prior to the enactment of the proposed legislation, of the control of any other carrier or carriers. This is deemed desirable in order that any penalties applicable to past acquisitions may still be enforced, and in order to save, to carriers which have acquired controls under the present paragraph (2) the benefits of the exemption in paragraph (8) from antitrust and other laws.

NECESSITY FOR LEGISLATION

In its annual report for 1929 the Interstate Commerce Commission expressed the belief that through the activities of holding companies—

> the subjection of the unification of carriers by railroad to the orderly processes of a carefully planned scheme of public regulation, which section 5 was designed to accomplish, is very likely to be partially or even wholly defeated, subject to the possibility that the Clayton Antitrust Act may in some measure, after protracted litigation, enable control over the situation to be maintained.

The House of Representatives passed Resolution 114, Seventy-first Congress, second session, under which the Committee on Interstate and Foreign Commerce conducted a thorough and comprehensive investigation. The results of that investigation were published as House Report No. 2789, Seventy-first Congress, third session. Incorporated in this report at page LXXXV were the recommendations of special counsel to the effect that section 5 of the interstate commerce act, as amended, be amended so as to bring within the jurisdiction of the Interstate Commerce Commission, for approval or disapproval, any acquisition of the control of a railroad which would result in bringing that railroad into affiliation with, in control of, or under the

management of another railroad, whether the acquisition be by holding company or otherwise, and that when a holding company is thus permitted to control a carrier by railroad, directly or indirectly, through ownership of stock, thereafter the accounts and capitalization of that holding company shall be subject to regulation by the commission.

The Interstate Commerce Commission in its annual report for 1931, at page 21 and at pages 84 to 86, made recommendations in harmony with this recommendation of the special counsel to the Committee on Interstate and Foreign Commerce. These recommendations were based upon the facts disclosed by the investigation conducted under House Resolution 114 and published in House Report No. 2789, Seventy-first Congress, third session. All of the pertinent facts are contained in that report.

In line with these recommendations and to remedy the defects in existing law disclosed by the facts contained in House Report No. 2789, H. R. 9059 was drafted. The chairman of the legislative committee of the Interstate Commerce Commission testified in the hearings on H. R. 9059 (p. 238), that the bill had been submitted to the entire commission and considered in conference together with a statement which the chairman of the legislative committee of the commission had made before the Committee on Interstate and Foreign Commerce (pp. 47 to 83, hearings, H. R. 9059) and the commission unanimously approved H. R. 9059.

The investigation under House Resolution 114 (H. Rept. No. 2789, 71st Cong., 3d sess.) disclosed that an important weakness of section 5, as it now stands, is that it places no control upon the activities of so-called holding companies in effecting unification of railway properties into systems. H. R. 9059 formed the basis for sections 1 to 4 of the present bill. In the hearings on that bill special counsel for the committee and the chairman of the legislative committee of the Interstate Commerce Commission illustrated this weakness of section 5. (Examples taken from H. Rept. No. 2789.) Striking illustrations are recorded on pages 21 to 26 and 48 to 50 of the record of hearings on H. R. 9059. The investigation into the holding companies conducted by the Committee on Interstate and Foreign Commerce disclosed that acquisitions which had been disapproved after formal hearings by the Interstate Commerce Commission had afterwards been accomplished through the use of holding companies. It further revealed that systems which had been approved by the commission, as in the public interest, and which in harmony with the commission's completed plan would be independent of one another, had been brought under the control of a single holding company. This investigation made clear that the independence, one of another of the railroad systems resulting from the congressional plan included in section 5 of the act to regulate commerce, was in some instances being destroyed, and in others, seriously threatened. (H. Rept. No. 2789, 71st Cong., 3d sess., pp. 714ff and 878ff.)

Apart from section 5 of the interstate commerce act, the commission has certain jurisdiction under the Clayton Act over acquisitions of control, direct or indirect, of one railroad by another, or acquisitions of common control of two or more railroads, where it can be established that the effect of such acquisitions may be to substantially lessen competition between the corporations involved, or to restrain the

commerce in which they are engaged, or to tend to create a monopoly of any line of commerce. But the enforcement of the commission's authority to break up such combinations after they have been put together is hedged about by many difficulties, and probably no such authority exists under the Clayton Act in the case of certain of the unifications which have been accomplished through the use of holding companies and which are described in House Report No. 2789.

Whether or not all or any of these unifications are consistent with the public interest does not have to be determined in order to reveal the necessity of further legislation. The important point is that unifications and groupings of railroads have been accomplished entirely without supervision by the commission and without any opportunity to consider the question of public interest. Under section 5 of the act to regulate commerce it was the purpose of Congress to place the unification of the railway properties of the United States entirely within the control of the commission. The investigation conducted by the House Committee on Interstate and Foreign Commerce, under H. Res. 114, reveals that wide opportunities exist for accomplishing such unifications without any such control and in complete defeat of the intent of the Congress. Moreover, these opportunities to circumvent the will of Congress, as expressed in section 5, exist irrespective of what the public interest may be. It is to correct this condition, and to prevent through the use of holding companies and other devices the defeat of the congressional will, that this bill has been drawn.

This bill specifically treats a holding company which has been authorized to acquire a railroad as though it were a common carrier in that, first, it must obtain approval of the commission to acquire control of two or more railroads; second, after obtaining such approval it must then, like the railroads, be subject to paragraphs (1) to (10), inclusive, of section 20 of the act (relating to reports, accounts, etc., of carriers), and to paragraphs (2) to (11), inclusive, of section 20a (relating to issues of securities and assumption of liabilities of carriers).

CONSTITUTIONALITY OF THE PROPOSED CHANGES IN SECTION 5

On page 43 of the hearings on H. R. 9059 is a record of a request by a member of the committee that the special counsel of the committee give the benefit of his views on certain legal questions raised. On page 278 and the following pages of the hearings on H. R. 9059 (the bill which formed the basis for the present bill) the views requested were set out in a statement by special counsel.

It is believed that the proposed legislation is constitutional because it deals in a valid way with a subject matter as to which Congress may properly legislate. Since the constitutionality of this bill depends largely on whether the purpose is one that Congress may validly attempt to accomplish, it may be said that the object of the bill is to supplement the provisions of section 5 of the interstate commerce act by recognizing the fact that a plan for the consolidation of railroads has been formulated as required by the provisions of that section and by adopting appropriate measures calculated to prevent consolidations, unifications, and acquisitions of holdings of control of railroads from being effectuated and maintained in such manner and under such circumstances as will defeat the consolidation plan which is the

basis of the public policy established by Congress with respect to railroad consolidations.

That this is a purpose well within the power of Congress would seem clear.

Early cases established that the interstate commerce clause gives Congress complete power in the regulation of interstate commerce, limited only by other provisions of the Constitution itself. (Gibbons *v.* Odgen (1824), 9 Wheat. 1; Brown *v.* Maryland (1827), 12 Wheat. 419.)

The power to regulate is the power to "aid and encourage," to "foster and protect," and to "control and restrain." (Gloucester Ferry Co. *v.* Pennsylvania (1885), 114 U. S. 196; Houston & Texas Ry. Co. *v.* United States (1914), 234 U. S. 342.)

The case of California *v.* Pacific Railroad Co. (1888) 127 U. S. 1, indicates the court's view in 1888, with respect to the power as it relates particularly to railroads. In that case the court denied the power of the State of California to make assessments against franchises granted to a railroad under Federal law. The court said, after referring to certain contentions which had been made as to the limits of the commerce power with respect to interstate railroads:

> * * * in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject (p. 39).

Dealing with the question as it is presented in modern times, the Supreme Court in the Dayton-Goose Creek case (1924), 263 U. S. 456, which involved the validity of the "recapture" provisions of the interstate commerce act, outlined the power of Congress in the following sweeping terms:

> * * * it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect, and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety. (The Daniel Ball, 10 Wall. 557, 564; County of Mobile *v.* Kimball, 102 U. S. 691, 696, 697; California *v.* Pacific R. R. Co., 127 U. S. 1, 39; Wilson *v.* Shaw, 204 U. S. 24, 33; Second Employers' Liability Cases, 223 U. S. 1, 47; Luxton *v.* North River Bridge Co., 153 U. S. 525, 529.)
>
> * * * If Congress may build railroads under the commerce clause, it may certainly exert affirmative control over privately owned railroads, to see that such railroads are equipped to perform, and do perform, the requisite public service (pp. 478–479).

If Congress may foster, protect, and control interstate commerce, with appropriate regard both to the railroads and to the public at large, and promote its growth and insure its safety, and the authorities referred to clearly show that it can, it seems certain that the object of the proposed legislation, namely, the protection and furtherance of the public policy as to interstate railroad consolidations, unifications, and acquisitions of control, is within the constitutional power of Congress.

It has been admitted by critics of the bill that Congress probably has power to provide for compulsory consolidation of railroads. This presupposes that such consolidation would have to conform to whatever plan and whatever reasonable conditions Congress might provide for. The present bill stops far short of compulsory consolidation, and it surely can not be said that it is any weaker constitutionally because Congress does not propose to exert the full power that it could exert.

If it is conceded that the purpose of the bill is one to which the interstate commerce power may extend, then if the means employed by Congress are reasonably necessary and appropriate to accomplish that purpose, there is no remaining ground upon which to base a claim of unconstitutionality.

It is well recognized that Congress has large discretion in selecting the means of carrying out its power.

> * * * Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. (McCulloch *v.* Maryland (1819), 4 Wheat. 316.)

An examination of the hearings on H. R. 9059 discloses that all the contentions that were made as to the unconstitutionality of the bill relate to the means which have been employed to effectuate the purposes of the bill.

With one exception these arguments were all directed at the proposed paragraph (6) of H. R. 9059, which is rewritten as paragraph (11) of H. R. 11643.

The one exception, and the point was not strongly urged, was that the provisions relating to future consolidations, mergers, and acquisitions of control, as well as the provisions of paragraph (6) of H. R. 9059 relating to divestiture may be unconstitutional as delegating legislative power. The point sought to be made was that Congress could not give the commission power to say whether it was in the public interest for stock in a railroad to be owned by a particular person or for railroads to be acquired or consolidated.

It is true that the public interest is one of the standards laid down in the proposed paragraph (4) to guide the commission in determining when to approve consolidations, mergers, and acquisitions of control. In order to support the contention that there is an unconstitutional delegation of legislative power in this provision it must be shown that this standard, namely, the public interest, is too indefinite. It is believed that an examination of the cases will show no act of Congress has ever been held to contain an unconstitutional delegation of power to an executive or administrative agency. Some of the principal cases in this field of the law are as follows: Field *v.* Clark (1892) (143 U. S. 649); Buttfield *v.* Stranahan (1904); (192 U. S. 470); Mutural Film Corporation *v.* Ohio Industrial Commission (1915) (236 U. S. 230); Hampton *v.* United States (1928) (276 U. S. 394).

The public interest is used as a standard in paragraphs (2) and (6) of section 5 of the interstate commerce act, which it is here proposed to amend and the provision of this bill is actually an expansion and enlargement of those very provisions of the act. Reference to the test of the public interest as applied by the commission in many applications under paragraph (2) of section 5, was made at page 13 of the hearings on H. R. 9059.

Another somewhat related point has been raised, that the bill would be invalid as vesting judicial functions in an administrative agency.

Congress may clothe an administrative agency with functions of a judicial or at least a quasi-judicial character, if the exercise of these functions is incidental to the exercise of its administrative powers. (See Louisville & Nashville R. Co. *v.* Garrett (1913), 231 U. S. 298; Ex parte Bakelite Corporation (1929), 279 U. S. 438; Crowell *v.* Benson (1932), — U. S. —, 52 S. Ct. 285.)

The question seems to be the same here as under the Clayton Act, and the validity of that act is unquestioned.

The bill provides for notice and hearing before the commission makes its order, and the orders of the commission are to be enforced only through proceedings in the district courts of the United States. No authority is given to the commission to determine finally any question which may be finally determined only by a court.

The remaining points on constitutionality that were raised related to paragraph (6) of H. R. 9059, which was revised as paragraph (11) of the present bill. Paragraph (6) of H. R. 9059 contained a provision for the divestment of ownership stock; this is changed in paragraph (11) of the present bill so as merely to provide for divestment of voting power with respect to stock. There was some confusion injected into the discussion of this paragraph by reason of failure to recognize how closely it is related to the consolidation plan. It was contended that the bill should be called "A bill to regulate the ownership of stock in railroads" implying that it contains provisions for arbitrary regulation of stock ownership and ignoring the fact that the respect in which stock ownership in railroads is sought to be regulated is exceedingly narrow and closely tied up with the basic purpose of preventing the defeat of the consolidation plan. It was even suggested that the logical result of doing what Congress proposes to do in this bill would be to permit Congress to say who owns oil wells and who may engage in other private enterprises. It was also alleged that Congress has no power to determine or to give to the Interstate Commerce Commission the power to determine whether it is in the public interest for an individual or a corporation not a railroad, to own the stock of a railroad. These arguments are without point because the present bill does not contain a provision to force the owners of stock to divest themselves of such ownership; it does contain the provision that the stock may not be voted by its owners to defeat the national policy adopted by Congress for consolidation of railroads.

There is no doubt that the Congress has the power to require divestment of stock in order to effectuate a valid policy which has been done with the approval of the courts under the Clayton Act. (See Standard Oil Co. *v.* United States (1911), 221 U. S. 1; United States *v.* American Tobacco Co. (1911), 221 U. S. 106.) Under that act the requirement of divestment is to enforce the prohibition against creating monopolies and restraining competition, while in this case the requirement is proposed to be used for what would appear to be the equally valid purpose of preventing the defeat of the congressional policy as to railroad consolidation.

It has been suggested that paragraph (11) would be subject to the constitutional prohibition against ex post facto laws. However, it would seem clear that the two elements necessary to make a law ex post facto are here absent. Ex post facto laws are those which apply new criminal punishments to acts done in the past. (Calder *v.* Bull (1798), 3 Dall. 336; Johannessen *v.* United States (1912), 225 U. S. 227). The provision in question does not apply to any acts done in the past. It does not make the act of acquiring stock accomplished in the past unlawful. It provides that stock shall not be held in the future in such a way as to defeat the policy of Congress. It thus applies to the future, not the past. With respect to the question of criminal punishment, which must exist if the ex post facto prohibition is to apply, the provision is unobjectionable, for it is regulatory, rather than penal, in character.

The paragraph is objected to as being retroactive. For the reason that it does not deal with the past act of acquiring stock, the paragraph can not logically be considered to be retroactive. However, even it is so considered, the retroactive feature is not in itself ground for a holding of unconstitutionality. It is true that it affects a right acquired in the past, but it is perfectly proper to do this in furtherance of a valid legislative policy.

Congress has in the past, by legislation which has been held valid, cut down or destroyed rights which had been lawfully acquired prior to the passage of such legislation.

For example, in Louisville & Nashville Railroad Co. *v.* Mottley (1911) (219 U. S. 467), an act abolishing free railroad passes was held valid even as to passes issued on good consideration prior to the enactment of the act. In Addyston Pipe & Steel Co. *v.* United States (1899) (175 U. S. 211), the Sherman Act was held to be valid even though it struck down contracts which had been made before the passage of the act. By virtue of the eighteenth amendment and enforcement acts liquor lawfully manufactured was converted from an asset into a liability in the manufacturer's hands, and the court held that the due process clause was not thereby violated. (Jacob Ruppert *v.* Caffey (1920) (251 U. S. 264); James Everard's Breweries *v.* Dale (1924) (265 U. S. 545).)

Other instances of retroactive laws upheld by the Supreme Court are found in certain State statutes. Such statutes, of course, must conform to the ex post facto and due process tests contained in the Federal Constitution. A Georgia citizen lawfully acquired liquor in 1905. The Georgia Legislature in 1917 outlawed possession of liquor. Seizure of the liquor was held not improper though no compensation was given. (Samuels *v.* McCurdy (1925), 267 U. S. 188.) Where a railroad built a proper embankment it was nevertheless accountable for maintaining an improper embankment when the Missouri Legislature required such embankments to be constructed in a different manner. (Chicago & Alton R. R. Co. *v.* Tranberger (1915), 238 U. S. 67.) These cases, though not involving Federal statutes, are nevertheless important, for due process is the same requirement whether the clause from the fifth or that from the fourteenth amendment is applicable.

Since the power of Congress has been exercised to require divestment of stock in order to effectuate a valid policy it can not be contended that it is unconstitutional for the Congress to require a less harsh remedy in order to accomplish a valid purpose.

It was more seriously argued that ownership of stock does not constitute interstate commerce and that the power of Congress can only be exercised with respect to the subject matter which is in interstate commerce or bears a substantial relation to interstate commerce. It is further objected that the paragraph applies to corporations and

persons not instrumentalities of interstate commerce. It can not be soundly argued that the holding of stock, no matter by whom, in such a way as to defeat the plan which is part of the public policy as to consolidation of interstate railroads, bears no substantial relation to interstate commerce.

The case of Northern Securities Co. *v.* United States (1904) (193 U. S. 197) was cited in support of the contention that Congress may not enact the paragraph under consideration because the ownership of stock in railroads is not interstate commerce and because the paragraph does not deal with the subject of interstate commerce. This case would seem to establish clearly that the ownership of stock by railroads by a holding company is a subject with which Congress may deal for the purpose of effectuating its policy with respect to interstate commerce.

In the Northern Securities case, a holding company and not a railroad-operating company, acquired ownership of a controlling amount of the stock of two railroads, the Northern Pacific Railway Co. and the Great Northern Railway Co. The action of the Northern Securities Co. was held to be a violation of the Sherman Anti-Trust Act of July 2, 1890, and the Supreme Court upheld the decree of the lower court enjoining the holding company from permitting the stock to be voted in its behalf, and enjoining the payment to the holding company of any dividends on account of such stock. It would seem that this decree of the court, from the legal standpoint, was substantially the same as though it had required divestment of stock, and it has already been shown that the requirement of divestment of stock is within the power of Congress in a proper case, and has been exercised under the Clayton Act.

The opinion of the dissenting minority of the court was quoted as supporting the view that the mere ownership of stock is not interstate commerce, and the opinion of the majo ity of the court was also quoted to show that the majority of the court held the same opinion as the minority on this question. This, however, is not important, because, regardless of the question whether the mere ownership of stock is or is not interstate commerce, the holding company was required to give up its voting power and right to dividends in respect of the stock in question in order to prevent the defeat of the policy of Congress declared in the Sherman Act against unlawful combinations and restraints in interstate commerce. It is, therefore, clear that this case stands as authority for the proposition that a holding company not itself a railroad may be required to give up its control of stock in a railroad in pursuance of a legitimate policy of Congress. The conclusion to be drawn is that if the protection of the consolidation plan is an object within the power of Congress, the means of accomplishing that end used here, namely, the requirement that stock shall be divested where its continued holding interferes or is likely to interfere with the carrying out of the consolidation plan established with respect to interstate railroads, is a means which Congress may lawfully adopt. The Sherman Act had for its purpose the furtherance of the policy of Congress against monopolies and restraints upon interstate commerce; the present bill has for its purpose what would seem to be the equally valid, although admittedly different, policy of preventing the defeat of the consolidation plan.

As has heretofore been shown, the interstate commerce power is broad and complete. It is even well settled, notwithstanding the contentions which have been made to this committee, that Congress may regulate matters which are not themselves interstate commerce, because of their relation to and influence upon interstate commerce. (Interstate Commerce Commission *v.* Goodrich Transit Co. (1912), 224 U. S. 194; United States *v.* Ferger (1919), 250 U. S. 199.)

In the case of Interstate Commerce Commission *v.* Goodrich Transit Co. (1912), (224 U. S. 194) the court upheld a provision of law authorizing the Interstate Commerce Commission to require accounts of railroads to be kept in a specified manner. The contention was made that the subject matter was not interstate commerce and that the provision was unconstitutional. The court said, however:

> Bookkeeping, it is said, is not interstate commerce. True, it is not. But bookkeeping may and ought to show how a business which, in part at least, in interstate commerce, is carried on, in order that the commission, charged with the duty of making reasonable rates and prohibiting unfair and unreasonable ones, may know the nature and extent of the business of the corporation, the cost of its interstate transactions and otherwise to inform itself so as to enable it to properly regulate the matters which are within its authority.
>
> We think the uniform system of accounting prescribed and the report called for are such as it is within the power of the commission to require under section 20 of the act. Nor do the requirements exceed the constitutional authority of Congress to pass such a law (p. 216).

In United States *v.* Ferger, which involved indictments under Federal bills of lading act, the court, in answer to the contention that the power of Congress did not extend to the control of fraudulent and fictitious bills of lading, said:

> * * * But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce (In re Debs, 158 U. S. 564) and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves. It would be superfluous to refer to authorities which from the foundation of the Government have measured the exertion by Congress of its power to regulate commerce by the principle just stated, since the doctrine is elementary and is but an expression of the text of the Constitution (p. 203).

For further discussion of the constitutional power of Congress to regulate stock ownership in railroads engaged in interstate commerce reference is here made to House Report No. 2789, Seventy-first Congress, third session (Pt. I, pp. 1–62), and particularly to pages 35 to 40 and pages 50 to 51.

Compliance With Rule XIII

In compliance with paragraph 2a of Rule XIII of the Rules of the House of Representatives, changes in existing law proposed by the bill are shown as follows: Existing law proposed to be omitted is inclosed in black brackets; new matter is printed in italics; existing law in which no change is proposed is shown in roman.

Sec. 5. * * *

[(2) Whenever the commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this act, that the acquisition, to the extent indicated by the commis-

sion, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the commission to be just and reasonable in the premises.]

[(3) The commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1) or (2), as it may deem necessary or appropriate.]

[(4)] *(2)* The commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible, and wherever practicable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties.

[(5)] *(3)* When the commission has agreed upon a tentative plan, it shall give the same due publicity and upon reasonable notice, including notice to the governor of each State, shall hear all persons who may file or present objections thereto. The commission is authorized to prescribe a procedure for such hearings, and to fix a time for bringing them to a close. After the hearings are at an end, the commission shall adopt a plan for such consolidation and publish the same; but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest. [The consolidations herein provided for shall be in harmony with such plan.

[(6) It shall be lawful for two or more carriers by railroad, subject to this act, to consolidate their properties or any part thereof, into one corporate for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation, under the following conditions:

[(a) The proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation mentioned in paragraph (5) and must be approved by the commission;

[(b) The bonds at par of the corporation which is to become the owner of the consolidated properties, together with the outstanding capital stock at par of such corporation, shall not exceed the value of the consolidated properties as determined by the commission. The value of the properties sought to be consolidated shall be ascertained by the commission under section 19a, of this act and it shall be the duty of the commission to proceed immediately to the ascertainment of such value for the properties involved in a proposed consolidation upon the filing of the application for such consolidation.

[(c) Whenever two or more carriers propose a consolidation under this section they shall present their application therefor to the commission, and thereupon the commission shall notify the governor of each State in which any part of the properties sought to be consolidated is situated and the carriers involved in the proposed consolidation of the time and place for a public hearing. If after such hearing the commission finds that the public interest will be promoted by the consolidation and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, with such modifications and upon such terms and conditions as it may prescribe, and thereupon such consolidation may be effected, in accordance with such order, if all the carriers involved assent thereto, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

[(7) The power and authority of the commission to approve and authorize the consolidation of two or more carriers shall extend and apply to the consolidation of four express companies into the American Railway Express Company, a Delaware corporation, if application for such approval and authority is made to the commission within thirty days after the passage of this amendatory act; and pending the decision of the commission such consolidation shall not be dissolved.

[(8) The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order shall be, and they are hereby, relieved from the operation of the "antitrust laws," as designated in section 1 of the act entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.]

(4) (a) It shall be lawful, with the approval and authorization of the commission as provided in subdivision (b), for two or more carriers to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through purchase of its stock; or for a corporation which is not a carrier to acquire control of two or more carriers through ownership of their stock; or for a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock.

(b) Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under subdivision (a), the carrier or carriers or corporation seeking authority therefor shall present an application to the commission, and thereupon the commission shall notify the governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants, of the time and place for a public hearing. If after such hearing the commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable.

(5) Whenever a corporation which is not a carrier is authorized, by an order entered under paragraph (4), to acquire control of any carrier or of two or more carriers, such corporation thereafter shall, to the extent provided by the commission, for the purposes of paragraphs (1) to (10), inclusive, of section 20 (relating to reports, accounts, etc., of carriers), including the penalties applicable in the case of violations of such paragraphs, be considered as a common carrier subject to the provisions of this act, and for the purposes of paragraphs (2) to (11), inclusive, of section 20a (relating to issues of securities and assumptions of liability of carriers), including the penalties applicable in the case of violations of such paragraphs, be considered as a "carrier" as such term is defined in paragraph (1) of such section, and be treated as such by the commission in the administration of the paragraphs specified. In the application of such provisions of section 20a in the case of any such corporation the commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance by each carrier which is under the control of such corporation of its service to the public as a common carrier, will not impair the ability of any such carrier to perform such service, and is otherwise compatible with the public interest.

(6) It shall be unlawful for any person, except as provided in paragraph (4), to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated in violation of this paragraph. As used in this paragraph, the words "control or management" shall be construed to include the power to exercise control or management.

(7) For the purposes of paragraph (6), but not in anywise limiting the application thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) If such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier.

(b) If such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier.

(c) If such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

(8) For the purposes of paragraph (7) a person shall be held to be affiliated with a carrier, if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding, organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such persons will be managed in the interest of such other carrier.

(9) For the purposes of paragraphs (6), (7), and (8), wherever reference is made to control it is immaterial whether such control is direct or indirect.

(10) The commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (6). If the commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the commission, to prevent continuance of such violation.

(11) For the proper protection and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3) and the regulation of interstate commerce in accordance therewith, the commission is hereby authorized, upon complaint or upon its own initiative, without complaint, but after notice and hearing, to investigate and determine whether the holding by any person of stock or other share capital of any carrier (unless acquired with the approval of the commission) has the effect (a) of subjecting such carrier to the control of another carrier or to common control with another carrier, and (b) of preventing or hindering the carrying out of any part of such plan or of impairing the independence, one of another, of the systems provided for in such plan. If the commission finds after such investigation that such holding has the effects described, it shall by order provide for restricting the exercise of the voting power of such person with respect to such stock or other share capital (by requiring the deposit thereof with a trustee, or by other appropriate means) to the extent necessary to prevent such holding from continuing to have such effects.

(12) If in the course of any proceeding under this section before the commission, or of any proceeding before a court in enforcement of an order entered by the commission under this section, it appears that since the beginning of such proceeding the plan for consolidation has been reopened under paragraph (3) for changes or modifications with respect to the allocation of the properties of any carrier involved in such proceeding, then such proceeding may be suspended.

(13) The district courts of the United States shall have jurisdiction upon the application of the commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

(14) The commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (4), (10), or (11), as it may deem necessary or appropriate.

(15) The carriers and any corporation affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the "antitrust laws" as designated in section 1 of the act entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by such order.

(16) If any provision of the foregoing paragraphs of this section, or the application thereof to any person or circumstances, is held invalid, the other provisions of such paragraphs, and the application of such provision to any other person or circumstances, shall not be affected thereby.

(17) As used in paragraphs (4) to (16), inclusive, the term "person" includes an individual, partnership, association, or corporation, and the term "carrier" means a carrier by railroad subject to this act.

[NOTE.—The four remaining paragraphs of section 5 are not shown, since the only change is in the paragraph number of each such paragraph.]

MINORITY REPORT

The undersigned dissent to the majority report with reference to the control of holding companies by the Interstate Commerce Commission, for the following reasons:

This bill seeks to vest new and unprecedented powers in the Interstate Commerce Commission, and which, if passed, would, in our judgment, create serious alarm in the minds of the investing public.

In our judgment the proposed law seeks to confer a power upon the Interstate Commerce Commission to determine under what circumstances any person or corporation shall acquire and own the shares of railroad companies. It gives the commission power to "require such person (the owner of such stock) to take such action as may be necessary in the opinion of the commission to prevent continuance of such violation" and the substance of the inhibited transaction is the acquirement by any person of "control or management in a common interest of any two or more carriers," or if the stock be already acquired "to continue to maintain control of management accomplished or effectuated in violation of this paragraph."

Moreover, the proposed bill further provides that if any such holding subjects "such carrier to the control of another carrier or to common control of another carrier" or prevents or hinders "the carrying out of any part of such plan" (the plan being a suggested consolidation of railroads), that in that event the commission may restrict "the exercise of the voting power of such person with respect to such stock or other share capital (by requiring the deposit thereof with a trustee or other appropriate means) to the extent necessary to prevent such holding from continuing to have such effects."

It will be noticed that the control by any person or carrier of more than one railroad corporation has no necessary relation to competitive conditions or monopolization and, therefore, does not necessarily involve any monopolization of commerce. A person or a corporation, which bought a controlling interest in a New England railroad and then acquired a controlling interest in a railroad on the Pacific coast, wholly for purposes of investment, would be within the provisions of the statute, even though there could be, in the nature of the case, no competition between the two railroads or any other relation that would affect the free flow of commerce. In the last analysis the proposed law means that if the Interstate Commerce Commission is of opinion that it is not in the public interest for one man or a corporation, being a holding company, to have the control through stock ownership of more than one carrier, the commission can compel him to divest himself of the stock or forfeit its most valuable right—i. e., the right to vote as such stockholder.

The validity under the Constitution of such a statute at once suggests itself. If justified at all, it can only be under the commerce clause of the Constitution. It is elementary that the Federal Government has no power over railroad corporations except in so far and to the extent that they are engaged in interstate commerce. In the case of Adair *v.* U. S. (208 U. S. Repts.), the Supreme Court said:

> The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed. Manifestly, any rule prescribed for

the conduct of interstate commerce in order to be within the competency of Congress under its power to regulate commerce among the States must have some real or substantial relation to or connection with the commerce regulated.

It may be well to recall the facts of that leading case. Under the commerce clause of the Constitution, Congress has passed a law which made it a criminal offense for any railroad carrier in interstate commerce to discharge an employee, similarly engaged in such commerce, because he was a member of a railroad union. In that case it was forcefully contended that as these railroad employees conducted the operations of interstate transportation, and as their membership, or lack of membership, in a labor union might conceivably affect the efficiency of their labor, that such a prohibition had a direct and substantial relation to interstate commerce. The Supreme Court negatived this contention upon two grounds. It held, in the first place, that membership in railroad labor organizations had no such direct or substantial relation to the current of interstate commerce as to justify Congress in passing the law, and it further held, in the second place, that even if such a prohibition could be otherwise justified as a regulation of commerce, yet the commerce clause was restricted in its operations by the fifth amendment, and that it was a violation of that amendment and a deprivation of the liberty and property of a railroad carrier to say that it could not determine whether it would employ union labor or nonunion labor.

The contention thus negatived had much more to support it than the provisions of this bill to which we object. Shares of stock in railroad corporations are acquired by individuals or corporations under State laws. They are valuable property rights, and the greatest of these rights it the right to vote the stock. The mere ownership of railroad shares is not interstate commerce, nor is the exercise of the voting power a subject of interstate commerce, unless it in some way obstructs the free flow of such commerce. In such event, the acquisition by a common owner of a control of two competing roads is within the Federal power, not because the ownership of stock is interstate commerce but because the use of such stock to eliminate competitive conditions and monopolize interstate traffic does bear a substantial relation to that freedom of commerce which the Constitution was intended to protect. In this case, the only suggestion of a substantial relation to the free flow of interstate commerce is that in the opinion of the commission the control of two carriers may interfere with a plan for the consolidation of railroads which Congress authorized the Interstate Commerce Commission to prepare.

This plan, at best a visionary dream, was only a plan to be submitted to the railroad carriers for their voluntary acceptance or rejection. No one has as yet seriously contended that under the commerce power the commission, or Congress, could consolidate the railroads of the United States against the wishes of the States that incorporated them and against the wishes of the owners who invested in such State corporations in good faith. If Congress could disrupt the entire railroad system of this country, as formed under State corporations, by compelling them to consolidate any two or more systems, then State laws and State charters become a mere scrap of paper. As the commission was simply authorized to suggest, and not to impose, a plan of consolidation, and has no power under existing law to do any more, the attempt of Congress by the proposed bill to

vest in the commission a right not merely to say whether the control of two noncompetitive carriers is prejudicial to the plan of consolidation, but to compel the owners of the stocks to part with the voting power of such stocks, surely bears no such substantial relation to interstate commerce as to justify the proposed legislation.

In other words, such control of mere ownership of stock is not a regulation of commerce within the meaning of the Constitution. Even if it could be regarded as a constitutional regulation of interstate commerce, yet, as in the Adair case, it would be subject to the fifth amendment, and we believe that the Supreme Court would not hesitate to say that to vest in the Interstate Commerce Commission an arbitrary power to compel the owners of railroad stocks to part with the most valuable right of voting the stock, would be to take their liberty and property without due process of law. The owner of such stock, in that event, would have no day in court. The fiat of the Interstate Commerce Commission, a purely political tribunal, would be final, and if this is not a denial of due process of law it is difficult to say what would be.

Interstate commerce, and, therefore, the power of the Federal Government, begins when the traffic, whether of persons or freight, starts from a point in one State and ends when in the course of a continuous transportation the traffic has reached its destination in another State. Unquestionably, the control of this commerce, which is the beginning and the end of Federal power, necessarily involves many antecedent conditions, over which the Federal Government has power, because that power has a distinct and substantial relation to conditions under which such interstate traffic moves. For example, the capital structure of railroad companies has a necessary bearing upon the reasonableness of rates, and the supervision of such capital structure by the Federal Government is, therefore, justified.

Again it is clear that the exercise of voting power by owners of railroad stock could be used to eliminate competitive conditions in transportation rates or service and, therefore, the control of two competitive rates in order to monopolize the traffic will justify the Federal Government in dissolving a holding company, which controls the voting power of the two competing companies. This was the point in the famous Northern Securities case. (193 U. S. 197.)

We do not claim, therefore, that Congress could not vest a power in the Interstate Commerce Commission to determine whether ownership of stock in two competing carriers by a person or a holding company may not so eliminate competitive conditions or monopolize traffic as to require divestiture of the stock, if there is an appeal to the courts, but the mere ownership of stock in different noncompeting companies by the same person or corporation, where there is no such obstruction to the free flow of interstate commerce, bears no such substantial relation to the regulation of interstate commerce as to justify Federal power. The Supreme Court in the Northern Securities case never decided that Congress had the power to regulate in and by itself the ownership of railroad stock, and no such contention was ever made by the Government in that case.

The commerce power of the Nation has been pushed to extreme limits, but hitherto it has never been suggested that there is any general power on the part of the Federal Government to determine who shall own or vote and who shall not own or vote railroad shares,

especially as these shares are those of corporations which were created by the States and owned by individuals.

Even if the constitutional power of the Federal Government to pass such a law be assumed, there remains the question whether Congress, especially in this critical period, should exercise a power which goes to the extreme limit of communizing the railroads of the United States under the power of a governmental bureau.

The creation of the Interstate Commerce Commission in 1887 was a wise act. It has for many years acted successfully and advantageously as a great arbiter between the railroads and the public. Much of its work is altogether admirable, but its history has been marked by an ever-increasing demand for greater power, and with the growth of this power the ability of the commissioners, collectively, to exercise these particular powers wisely, has grown less. To-day the Interstate Commerce Commission claims to be a superboard of directors for all the railroads of the United States. Freely recognizing the inestimable good that the work of the commission has done, can it be ignored that its drastic and minute supervision of these railroads has injured their credit, imposed heavy burdens of expense upon the carriers and thus contributed somewhat to the deplorable conditions in which the railroads and their investing owners now find themselves?

If the law is now to be broadened and the commission is to be given the power, acting simultaneously as prosecutor, judge, and executioner, to control the question of railroad ownership irrespective of its effects upon the freedom of interstate commerce and only because, in its discretion, it interferes with its preparation of a plan of consolidation, then the States have lost control over corporations of their own creation and individuals can only own railroad stocks "by and with the advice and consent of the commission."

We recognize the commission would, in all probability, exercise the power conservatively, but it is the spirit of the English-speaking race to be as much concerned with the possible abuse of power as the power itself. In any event, if Congress shall now vest in the commission a power to determine under what conditions men may own or vote stock in more than one railroad, however noncompetitive they may be, then the next logical step is Government ownership of the railroads, and the chief proponent of this law, who appeared before the committee in its behalf, apparently has this in mind. The amazing fact is that none of its proponents has been able to suggest any tangible facts that would show that these holding companies have been prejudicial to any legitimate railroad interests.

We are indisposed to grant further powers to this greatest of all governmental bureaus unless the advantage to the public is reasonably clear. Far from that being the case in respect to the present law, it seems to us a fact that to pass this law at this time, when many of the railroads are in a moribund condition, is to increase the investor's present lack of confidence, and possibly lead to a grave financial crisis. By common consent, the railroad companies are to-day in a very serious condition, and it is, therefore, no time to subject them to a major surgical operation.

JAMES M. BECK.
JOHN G. COOPER.
ADAM M. WYANT.
JAMES T. IGOE.

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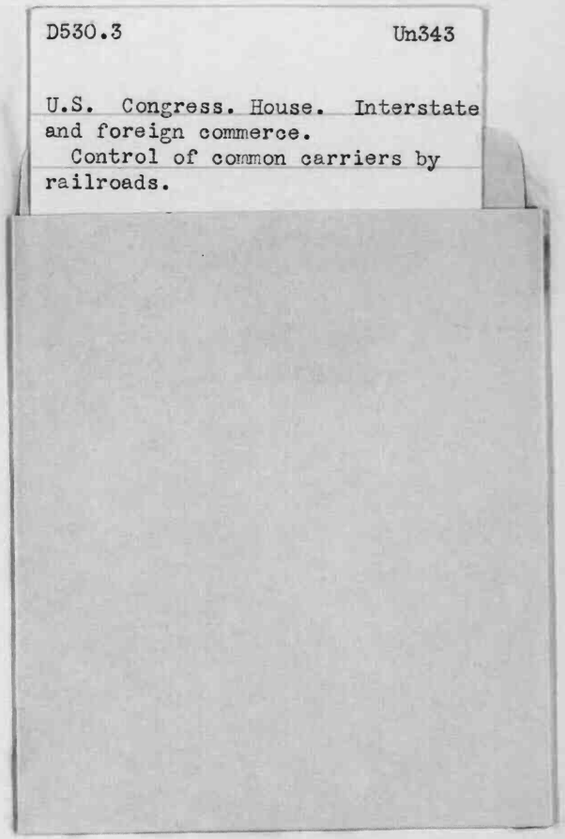
Control of common carriers by railroads.



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